

# MINTZ LEVIN

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September 1, 2016

**VIA ELECTRONIC MAIL & OVERNIGHT DELIVERY**

Federal Elections Commission  
Office of Complaints Examination  
and Legal Administration  
Attn: Jeff S. Jordan, Assistant General Counsel  
Donna Rawls, Paralegal  
999 E Street, N.W.  
Washington, DC 20463

OFFICE OF GENERAL  
COUNSEL

2016 SEP - 1 PM 12:02

RECEIVED  
FEDERAL ELECTION  
COMMISSION

Re: **MUR 7099**

Dear Mr. Jordan and Ms. Rawls,

I write as counsel to Suffolk Construction Company, Inc. ("Suffolk" or "Respondent") in the above-referenced matter. Suffolk takes its responsibilities under federal campaign finance laws very seriously and appreciates the opportunity to respond to the allegations raised in the Complaint of Campaign Legal Center, Democracy 21, and Paul A. Ryan (the "Complainants") in this matter.

The Complainants allege that Suffolk violated federal law and Commission regulations by making certain campaign contributions at a time when Suffolk was purportedly a "federal contractor" for the purposes of federal election laws. At the time of these contributions, Suffolk held the genuine and reasonable understanding that it would not be considered a federal contractor, and thus, any potential violation of federal election laws or Commission regulations would have been entirely unintentional. In fact, Suffolk promptly reviewed these contributions when it realized that they might raise concerns, and as a result, the full amount of the contributions was returned before the filing of the Complaint in this matter. Because any violation would have been entirely unintentional and promptly remedied before any possible harm could have occurred, the Commission should take no further action and promptly dismiss this matter.

By way of background, Suffolk is a Massachusetts corporation that primarily serves as a general contractor and construction manager for privately funded construction projects. While Suffolk has performed work on federal contracts in the past, that work constitutes a small fraction of Suffolk's portfolio. In fact, federal contracts constitute less than 0.5% of all contracts Suffolk has serviced in the past five years, and Suffolk received less than 0.7% of its total revenue from federal contracts during that five-year period.

**Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.**

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As explained more fully below, the present matter stems from ambiguity regarding Suffolk's status as a federal contractor under a single engagement that was initially entered in March 2009 and extensively amended thereafter. Suffolk believed that the engagement was complete such that Suffolk did not consider itself to be a federal contractor at the time it made certain campaign contributions on July 20, 2015 and December 17, 2015. Upon learning that its understanding might be incorrect, Suffolk immediately took steps to remedy any concerns and both contributions were returned in full from Priorities USA Action ("Priorities") to Suffolk before filing of the Complaint in this matter.

**I. The Complaint Contains Inaccurate Information and Raises Allegations Regarding an Immaterial Government Contract.**

As an important preliminary matter, certain information provided in the Complaint is factually inaccurate. For instance, the Complaint alleges – based upon data from USAspending.gov – that Suffolk held five contracts with the Department of Defense in Fiscal Year 2016. Complaint ¶6. This is inaccurate. The Award Summary from USAspending.gov shows that three of the five purported government "contracts" held by Suffolk in Fiscal Year 2016 were not active contracts – two were actually settlement agreements for previously completed work and one was an administrative modification to a prior completed contract "due to typo" in the original contract. Suffolk performed no work pursuant to these three "contracts" in Fiscal Year 2016.<sup>17</sup>

On top of such inaccuracies, the Complaint raises allegations regarding a contract that is entirely immaterial to the contributions at issue in this matter. Specifically, the Complaint alleges that Suffolk's contributions were improper because Suffolk was a federal contractor for a construction project at the U.S. Naval Station in Newport, Rhode Island (the "Navy Project"). See Complaint ¶11. In reality, Suffolk was not a federal contractor for the Navy Project at the time the two at-issue contributions were made, and thus, the Navy Project is entirely irrelevant to the claims raised in the Complaint.

Pursuant to 52 U.S.C. §30119(a)(1), a federal contractor is prohibited from making contributions only during the time between the commencement of negotiations for a federal contract and the completion of performance under that contract. Here, Suffolk was awarded the contract for the Navy Project on August 9, 2011<sup>27</sup> and completed performance under the Navy Project contract by April 2015. Indeed, Suffolk notified the U.S. Navy via letter on April, 30, 2015 that "[a]ll of [Suffolk's] work is complete."<sup>37</sup> As such, Suffolk's work on the Navy Project

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<sup>17</sup> See Award Summary from USAspending.gov for Award Number N4008511C7231 (available at <https://www.usaspending.gov/transparency/Pages/AwardSummary.aspx?awardId=22576081>) (last accessed August 30, 2016).

<sup>27</sup> See Exhibit A, Letter from Department of Navy to Suffolk regarding award of contract for Navy Project, dated August 9, 2011.

<sup>37</sup> See Exhibit B, Letter from Suffolk to Newport Naval Station Construction Manager, dated April 30, 2015.

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was completed months before the two contributions at issue in the Complaint, which are alleged to have occurred on July 20, 2015 and December 17, 2015. *See* Complaint ¶8.

Because Suffolk's performance under the Navy Project contract was completed months before Suffolk's first contribution to Priorities, the Navy Project contract is entirely immaterial to the claims raised in the Complaint. For this reason, the Commission should afford no weight to any allegations in the Complaint related to the Navy Project.

**II. Suffolk's Work on West Point Motor Pool Engagement.**

In reality, the Complaint places only one engagement at issue: a complex, extensively amended engagement with the U.S. Army Corps of Engineers (the "USACE") for various construction projects at a Motor Pool facility in West Point, New York (the "Motor Pool Engagement").

When the Motor Pool Engagement commenced in March 2009, the original contract provided that Suffolk would assist the USACE in relocating a Motor Pool facility.<sup>41</sup> The term of the original contract contemplated that Suffolk's work on the Motor Pool Engagement would be completed "within 420 calendar days" after receiving notice to proceed from the USACE.<sup>51</sup> By June 2011, Suffolk had completed all work called for in the contract and resolved all warranty issues and outstanding punchlist items. At that time, Suffolk sought to have the Motor Pool Engagement closed out with USACE. The USACE, however, elected to keep the contract "open" for its own purposes because it wanted to have Suffolk available in the event any future work at the facility might be needed. The USACE communicated that it was keeping the contract open to Suffolk's Project Manager for the Motor Pool Engagement, and no notice was provided to Suffolk's management team. As a result, Suffolk's management team closed out the contract for its internal accounting purposes in August 2012 because all work under the contract had been completed for over a year at that point in time.

Over two years after Suffolk's work on the original Motor Pool contract was completed, the USACE issued Contract Modification ("MOD") 26, which called for, among other things, the design of a waste water treatment plant at the Motor Pool. Because the work under MOD 26 constituted an entirely new project that was independent of Suffolk's prior work relocating the Motor Pool facility, Suffolk's Project Manager decided to open a new project number for MOD 26 instead of re-opening the project number used for the original contract for the Motor Pool Engagement. Suffolk completed its work on MOD 26 on December 14, 2014. The following week, the USACE issued MOD 27, which called for work on the boiler and propane supply system at the Motor Pool. This too was new work unrelated to the original Motor Pool Engagement. Suffolk completed its work on MOD 27 on January 22, 2015 and closed out the new project number created for MOD 26 and MOD 27.

<sup>41</sup> *See* Exhibit C, Cover letter and excerpt from original contract for Motor Pool Engagement.

<sup>51</sup> *Id.* at § 11.

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Approximately six months later (on July 7, 2015), Suffolk received MOD 28, which called for, among other things, the installation of a new green filter at the Motor Pool. The USACE then issued Amendment P00002, dated September 18, 2015, which called for the furnishing and installation of an effluent line at the Motor Pool. Suffolk's Project Manager again created a new project number for its work on MOD 28 and Amendment P00002, and Suffolk's work on these projects spanned from December 2015 to August 2016.

In sum, Suffolk's work on the Motor Pool Engagement occurred in three distinct phases, each of which was temporally and substantively distinct from the others. Despite each phase effectively constituting its own distinct project, the USACE elected to treat all phases as extensions or modifications to the long-completed Motor Pool facility relocation contract awarded in 2009. Suffolk, on the other hand, treated each phase of the Motor Pool Engagement as its own separate project, creating new project numbers for each of the three phases. Only the third phase – Suffolk's work on MOD 28 and Amendment P00002 – remained incomplete when the at-issue contributions were made, and those relatively minor projects were of such a small scale that they were not independently elevated to the attention of Suffolk's executive management team.

**III. Suffolk Promptly Procured Return of Both Contributions After Learning of Potential Concerns.**

The unique and complex nature of the Motor Pool Engagement resulted in ambiguity as to whether Suffolk would be considered a "federal contractor" for the purposes of campaign finance laws in 2015. This ambiguity was amplified by the USACE's decision to keep the Motor Pool Engagement "open" to accommodate future projects at the same site. In Suffolk's reasonable belief, Suffolk's work under the Motor Pool contract was complete at the time Suffolk completed all warranty issues and punchlist items in 2011. Suffolk did not fully understand that it might still be considered a "federal contractor" for projects it completed years earlier, but had been left open on the federal agencies' ledgers for the agencies' own convenience or planning purposes.

Notwithstanding this ambiguity, Suffolk acted appropriately and immediately when it learned that the Motor Pool Engagement might present an issue with respect to Suffolk's campaign contributions in July and December 2015. Indeed, Suffolk procured return of the full amount of both contributions at issue before the Complaint in this matter was even filed.<sup>67</sup> Under circumstances such as this – where a nominal violation might have occurred but no harm could have possibly resulted – the Commission should take no further action on the Complaint. *See*

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<sup>67</sup> Upon learning of this issue, Suffolk promptly reviewed these contributions and engaged in extensive communications with Priorities. As a result of this process, the full amount of both contributions was returned from Priorities to Suffolk on June 30, 2016. *See* Exhibit D, Check from Priorities to Suffolk in the amount of \$200,000, dated June 30, 2016.

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Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

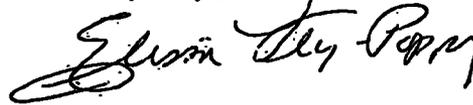
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First General Counsel's Report MUR 5424 (after finding that "there appear to have been *de minimis* violations," General Counsel recommended that Commission "take no further action, send admonishment letters, and close the file."). Such an outcome would be consistent with the Commission's regulations for political committees, which allow committees to return previously-accepted contributions within thirty days of discovering that the contributions might raise concerns under federal election laws. *See* 11 C.F.R. §103.3(b)(2).

For these reasons, Suffolk respectfully requests that the Office of the General Counsel recommend that the Commission take no further action on the Complaint and close the file. As detailed above, any inadvertent violation that may have occurred would have been *de minimis* and immediately remedied by Suffolk before any harm could have possibly resulted. Additionally, Suffolk has implemented a new vetting process for federal campaign contributions to ensure compliance with federal election law. Through this process, all of Suffolk's federal campaign contributions will be evaluated by Suffolk's legal counsel to ensure full compliance with all federal election laws. Under these circumstances, the Commission should take no further action and promptly dismiss this matter. If you have any questions or require any additional information, please feel free to contact me.

Very truly yours,



Elissa Flynn-Poppey

R. Robert Popeo

Kelly L. Frey

Enclosures

INFORMATION

www.woodwardclark.com

# EXHIBIT A



**DEPARTMENT OF THE NAVY**  
**NAVAL FACILITIES ENGINEERING COMMAND MID-ATLANTIC**  
 9742 MARYLAND AVENUE  
 NORFOLK, VA 23611-3098

TELEPHONE NO:  
 (757) 341-0081

IN REPLY REFER TO  
**N40085-11-C-7231**  
**09 August 2011**

Transmitted by email: [mike.dinapoli@suffolkconstruction.com](mailto:mike.dinapoli@suffolkconstruction.com)

Suffolk Construction Company, Inc.  
 ATTN: Michael A. DiNapoli  
 3190 Fairview Park Drive  
 Falls Church, VA 22042

**SUBJECT: Contract N40085-11-C-7231, P-068, Electromagnetic Sensor Facility, Naval Station  
 Newport, Newport Rhode Island**

Dear Mr. Michael A. DiNapoli

**Congratulations! You have been awarded the subject project. Enclosed is the SF 1442; please sign and return it as soon as possible. This letter DOES NOT constitute Notice to Proceed (NTP).**

Request you submit Certificate of Insurance and Performance and Payments bonds to this office, Attn: Lynn Lovejoy. As a reminder, the clause in the certificate must be acceptable. In accordance with Section 00700, Contract Clauses, FAR Clause 52.228-5, Insurance - Work On a Government Installation, states "any cancellation or any material change adversely affecting the Government's interest shall not be effective (1) for such period as the laws of the State in which this contract is to be performed prescribed or (2) until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer." Therefore, such statements as "will endeavor to give written notice to the certificate holder" and "failure to mail such notice shall impose no obligation or liability of any kind upon the company" are unacceptable.

Contact Mrs. Karen Sampson at (401) 841-1764, within 10 days after the date of this letter to arrange a preconstruction meeting.

Sincerely,

**CARMACK.ELIZABE**  
**TH.M.1229718149**  
 Elizabeth M. Carmack  
 Supervisory Contract Specialist  
 Contracting Officer  
 By direction of the Commanding Officer

Digitally signed by  
 CARMACK.ELIZABE TH.M.1229718149  
 DN: cn=C.ELIZABE TH.M.1229718149, o=U.S. Government, ou=DoD, email=C.ELIZABE TH.M.1229718149, c=DNS, postalCode=13 22119-0000

Encl: DD 1155

**Quality Performance. . . Quality Results**

14-00000-1

UNCLASSIFIED

## **EXHIBIT B**



INFORMATION

# EXHIBIT C

**SUFFOLK**

March 12, 2009

Mr. Shaukat Syed  
US Army Corps of Engineers, New York District  
26 Federal Plaza, Room 1843  
New York, NY 10278-0090

Subject: USACE Contract Number W912DS-09-C-0005  
DOL Motor Pool Facilities Relocation, USMA, West Point, NY  
Suffolk Job No. 209092  
Contract, Bonds and Insurance

Reference: March 6, 2009 Notice of Award

Dear Mr. Syed:

Attached please find the following documents as requested:

- One signed copy of the contract,
- One original Performance Bond (Standard Form 25: Rev. 5-96),
- One original Payment Bond (Standard Form 25A; Rev. 10-98),
- Certificate of Liability Insurance,
- Signed acknowledgment of Notice of Appointments dated March 6, 2009

Please call me if you have any questions, or need additional information.

Respectfully,

SUFFOLK CONSTRUCTION CO., INC.



Bernard L. Grove

Vice President of Operations

BLG

By Overnight Delivery  
attachments

cc/att: File, B. Grove, J. Gorman, M. Papotto, J. Seaburg

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<b>SOLICITATION, OFFER, AND AWARD</b> <i>(Construction, Alteration, or Repair)</i>	1. SOLICITATION NO.	2. TYPE OF SOLICITATION	3. DATE ISSUED	PAGE OF PAGES
	W912DS-09-R-0001-0008	<input type="checkbox"/> SEALED BID (IFB) <input checked="" type="checkbox"/> NEGOTIATED (RFP)	05-Mar-2009	1 OF 85

IMPORTANT - The "offer" section on the reverse must be fully completed by offeror.

4. CONTRACT NO. W912DS-09-C-0005	5. REQUISITION/PURCHASE REQUEST NO. W16R08B087539	6. PROJECT NO.
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7. ISSUED BY US ARMY CORPS OF ENGINEERS, NEW YORK 28 FEDERAL PLAZA, RM 1843 NEW YORK NY 10278-0080  TEL: 212 264-0238 FAX: 212 264-3013	CODE W912DS	8. ADDRESS OFFER TO (If Other Than Item 7) CODE  See Item 7  TEL: FAX:
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9. FOR INFORMATION CALL:	A. NAME LORETTA E PARRIS	B. TELEPHONE NO. (Include area code) (NO COLLECT CALLS) 917-790-8182
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**SOLICITATION**

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

10. THE GOVERNMENT REQUIRES PERFORMANCE OF THE WORK DESCRIBED IN THESE DOCUMENTS (Title, identifying no., date):

NAICS Code: 236220, Size Standard: \$33.5 Million

a. This procurement is a Best Value Solicitation for the Construction of Department of Logistics (DOL) Motor Pool Facilities Relocation, United States Military Academy Preparatory School (USMAPS), United States Military Academy, West Point, New York. The authority for this action is Federal Acquisition Regulation (FAR) part 15.101-1, Tradeoff process.

b. Contract Specialist: Wei Lugin (917) 790-8073  
Technical Manager: Jose Diaz (917) 790-8390

c. Unrestricted procurement with HUBzone Small Business Price Evaluation Preference (FAR Clause 52.219-4)

d. Site Visit: A Site Visit and a pre-proposal conference in connection with the Request for Proposal (RFP) will be held at Bldg. 667A, West Point, NY 10986, on 4 December 2008, 10AMEST. (See FAR Clause 52.236-27)

e. The liquidated damages is \$6,255 for each day of delay.

11. The Contractor shall begin performance within 10 calendar days and complete it within 420 calendar days after receiving  award,  notice to proceed. This performance period is  mandatory,  negotiable. (See 52.211-10)

12 A. THE CONTRACTOR MUST FURNISH ANY REQUIRED PERFORMANCE AND PAYMENT BONDS? (If "YES," indicate within how many calendar days after award in Item 12B.) <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	12B. CALENDAR DAYS 10
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13. ADDITIONAL SOLICITATION REQUIREMENTS:

A. Sealed offers in original and 1 copies to perform the work required are due at the place specified in Item 8 by 02:00 PM (hour) local time 18 Feb 2009 (date). If this is a sealed bid solicitation, offers must be publicly opened at that time. Sealed envelopes containing offers shall be marked to show the offeror's name and address, the solicitation number, and the date and time offers are due.

B. An offer guaranteed  is,  is not required.

C. All offers are subject to the (1) work requirements, and (2) other provisions and clauses incorporated in the solicitation in full text or by reference. Offers providing less than 120 calendar days for Government acceptance after the date offers are due will not be considered and will be rejected.

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Priorities USA Action  
601 13th Street NW  
Suite 810N  
Washington, DC 20003

AMALGAMATED BANK  
01-33/280

12180

08/30/2016

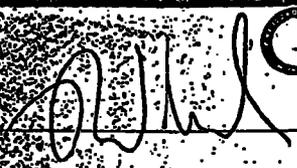
PAY TO THE ORDER OF Suffolk Construction Company, Inc.

\$200,000.00

Two hundred thousand and 00/100

DOLLARS

Suffolk Construction Company, Inc.  
85 Allerton St.  
Boston, MA 02199



MEMO

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